SUPREME COURT, U. S.

FILED
JUL 6 1961
JAMES R. BROWNING, Clerk

No. 133

In the Supreme Court of the United States

OCTOBER TERM, 1961

VULCANIZED RUBBER & PLASTICS COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

Statute:

Federal Trade Commission Act, 15 U.S.C. 45:

Section 5(b)	6
Section 5(l)	2, 6

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a-10a) is reported at 288 F. 2d 257.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1961 (Pet. App. 11a). The petition for a writ of certiorari was filed on June 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order of the Federal Trade Commission prohibiting petitioner from representing that its hair combs are made of "rubber" or "hard rubber" prohibits the representation that they are made of "rubber-resin."

STATUTE INVOLVED

The pertinent provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, are set forth in the appendix to the petition (Pet. 14a-17a).

STATEMENT

This is a proceeding brought by the United States under Section 5(l) of the Federal Trade Commission Act to recover statutory penalties for violation of a cease-and-desist order of the Federal Trade Commission. The District Court for the Eastern District of Pennsylvania found that the petitioner had violated the order and awarded penalties of $6,000 (Pet. 1a). The Court of Appeals for the Third Circuit (Judge Hastie dissenting) affirmed (Pet. 1a-10a).

The relevant facts are as follows:

Petitioner is engaged in the manufacture and sale of hair combs throughout the United States. In 1954 the Federal Trade Commission issued a complaint charging that petitioner had misrepresented that its combs, which were composed of approximately 13% synthetic latex and 85% hard plastic resin (and small percentages of stabilizer and color), were made of

rubber or hard rubber. After full administrative proceedings, the Commission held that the public understands that a "rubber" comb means one made of hard rubber; that hard rubber is made of sulphur and latex by the vulcanizing process; and that since petitioner does not use that process, its description of its combs as rubber or hard rubber was false and misleading. The Commission ordered petitioner to cease and desist from "representing, directly or by implication, * * * that [its] combs are 'rubber' or 'hard rubber' or made of 'rubber' or 'hard rubber' unless such combs are in fact made of vulcanized hard rubber" (Pet. 2a).

Petitioner sought review of that order in the Court of Appeals for the District of Columbia Circuit. It challenged the evidentiary support for the Commission's findings of misrepresentation, and contended that the order was arbitrary and capricious because it "prohibits the petitioner from representations that said combs * * * are 'resin rubber,' when such is the fact" (see Brief for Petitioner and Joint Appendix in Case No. 13,986, C.A.D.C., pp. 59-60).[1]

While the review petition was pending, petitioner submitted a compliance report to the Commission stating that it intended to describe its combs as "rubber-resin". On November 1, 1957 the Commission formally advised petitioner that it did not consider the use of the term "rubber-resin" as compliance with the order (R. 62a).[2] Petitioner then

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[1] A copy of this Brief and Joint Appendix have been lodged with the Clerk.

[2] "R." refers to the appellant's appendix in the court of appeals.

amended its petition for review to withdraw the claim that the Commission's findings were not supported by substantial evidence, and to add the new contention that the order was arbitrary and capricious because it prohibited petitioner "from representing that [its] combs are 'rubber-resin' when such is the fact". (Br. and Jt. App. in Case No. 13,986, C.A.D.C., pp. 73, 82). "Thereafter, in the proceeding before the United States Court of Appeals for the District of Columbia Circuit, Petitioner did not challenge the Commission's order as written, but contended that the Commission's subsequent interpretation of its order exceeded the terms and bounds of the order" (Pet. 6).

Faced with this situation, the court of appeals in a *per curiam* opinion unanimously dismissed the petition to review. 258 F. 2d 684 (Pet. 12a-13a). It held that petitioner had not challenged the order "*as written*," but "only the Commission's subsequent interpretation of its order" as prohibiting the representation that the combs are "rubber-resin"; and that since "this interpretation may be changed or it may never be enforced * * * there is no controversy calling for judicial review of the interpretation at the present time" (Pet. 13a).

Petitioner continued to use the term "rubber-resin" to describe its combs. At the request of the Commission, the United States, on April 7, 1959, instituted the present civil action for penalties for violating the cease-and-desist order (R. 2a-6a). On cross-motions for summary judgment, the district court held that petitioner had violated the order, and imposed a penalty of $6,000 (R. 72a-77a, 78a).

The court of appeals affirmed, holding that petitioner had violated the order by labelling its combs as "rubber-resin." (Pet. 1a-10a). The court pointed out (Pet. 4a) that the examiner (whose findings the Commission adopted) "found that the term rubber had a fixed and definite meaning. It was used to describe a distinct process whereby rubber and sulphur are vulcanized under heat." The court stated (Pet. 6a) that petitioner's description of its combs as rubber-resin "impliedly represents the combs to be made by a vulcanizing process which contains rubber and sulphur, when in fact the combs do not contain the ingredients nor are they produced by the process found by the Commission to be necessary to permit such labeling"; and that "[t]he substitution of the compound word 'rubber-resin' for 'rubber' on a product which is not produced with the ingredients and by the process held by the Commission to be the only recognized method to produce 'rubber' is as much a violation of the Order as if defendant had continued to label its combs 'rubber' " (Pet. 7a).

ARGUMENT

1. Petitioner's primary ground for seeking review is to resolve the alleged conflict between the decision below and that of the Court of Appeals for the District of Columbia Circuit in the earlier case (see *supra*, pp. 3-4) over whether the order prohibits representing that petitioner's combs are made of rubber-resin. Even if there were such a conflict, that would not warrant granting the writ, since the alleged disagreement between the two circuits is solely with

respect to the meaning of a particular Commission cease-and-desist order and does not involve any significant question of law. In any event, there is no conflict. For, as the Statement, *supra*, makes clear, the Court of Appeals for the District of Columbia Circuit, in dismissing petitioner's earlier review petition, plainly did not decide whether the use of the phrase "rubber-resin" fell within the prohibitions of the Commission's order. Its statement that it did "not understand the order *as written* to be challenged" (Pet. 13a), considered in the then posture of the review proceeding, merely reflected the fact hat petitioner had abandoned its attack on the findings. If, as petitioner now asserts, the District of Columbia Circuit had intended to rule that the Commission's order "as written" did not prohibit petitioner from designating its combs as "rubber-resin", it obviously would not have dismissed the case as premature.

2. Petitioner's other arguments are equally lacking in merit. The question whether the district court and the court of appeals correctly held that the Commission's order prohibits petitioner from designating its combs as "rubber-resin" involves only the scope of this particular order, and does not warrant further review by this Court. Petitioner's contention that the government should have instituted a new administrative proceeding under Section 5(b) of the Federal Trade Commission Act instead of filing the instant action under Section 5(l) for penalties is but another way of attempting to argue that the order does not prohibit use of the term "rubber-resin." For the Commission would be required to institute a

new proceeding only if the order as now drawn does not ban that phrase.

The issue in the penalty proceeding was whether petitioner's representations were prohibited by the order, not whether they were misleading. Petitioner could have litigated the validity of the Commission's order in the review proceedings before the District of Columbia Circuit, as it initially sought to do. But when petitioner abandoned in that court its attack upon the underlying findings and upon the order as written (see *supra*, pp. 3-4), it eliminated from this case any issue as to whether labeling combs not made by the vulcanizing process as "rubber-resin" was false and misleading. On the narrow question involved in the penalty proceeding—whether petitioner had violated the order—both courts below correctly ruled that it had.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1961.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 599916 1495